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WALT FROLOFF
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In re Application of :
Froloff, Walt :
Application No. 10/648,433 : **ON PETITION**
Filed: August 25, 2003 :
Attorney Docket No. Emo2 :

This is a decision on the petition under 37 C.F.R. § 1.137(b), filed May 24, 2007, to revive the above-identified application. In view of the allegation in the petition of the non-receipt of the Notice of Allowance, the petition will also be considered under 37 CFR 1.181 requesting the withdrawal of the holding of abandonment in the above-identified application.

The petition under 37 C.F.R. § 1.181 is **DISMISSED**.

The petition under 37 C.F.R. § 1.137(b) is **GRANTED**.

The above-identified application became abandoned for failure to timely and properly reply to the final Office action mailed March 8, 2006. Accordingly, the above-identified application became abandoned on June 9, 2006. A Notice of Abandonment was mailed on May 1, 2007.

Petitioner stated that the Notice Requiring Extension of Time Fees (Notice) mailed October 27, 2006 was never received. An allegation that an Office action was not received may be considered as a petition for the withdrawal of the holding of abandonment. If the allegation is adequately supported, the petition may be granted and a new Office action mailed. The showing required to establish non-receipt of an Office communication must include:

1. A statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.

2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.

In the absence of any irregularity there is a strong presumption that the communications was properly mailed to the applicant at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communications was not in fact received.

¹ See notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

The showing in the instant petition is not sufficient to withdraw the holding of abandonment because practitioner did not include a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.


Petitioner also submitted a new Petition for Extension of Time (along with payment of the \$60.00 one-month extension of time fee) on November 7, 2006, along with a copy of the Notice. If petitioner failed to receive the Notice, it is unclear how petitioner was able to return a copy of the Notice with the new Petition for Extension of Time.

Further, the response submitted on October 10, 2006 was not timely with or without an extension of time. An extension of time under 37 CFR 1.136 must be filed prior to the expiration of the maximum extendable period for reply. See In re Application of S., 8 USPQ2d 1630, 1631 (Comm'r Pats. 1988). The maximum statutory period for reply to a final Office action is 6 months, which would have been September 8, 2006. See 35 U.S.C. 133. Accordingly, since the \$60.00 extension of time fees submitted on October 10, 2006 and November 7, 2006 were subsequent to the maximum extendable period for reply, these fees are unnecessary and will be refunded via treasury check in due course.

However, petitioner has met the requirements to revive the above-identified application pursuant to 37 CFR 1.137(b). The petition satisfies the conditions for revival pursuant to the provisions of 37 CFR 1.137(b) in that (1) the reply in the form of a Request for Continued Examination (RCE); (2) the petition fee; and (3) the required statement of unintentional delay have been received. Accordingly, the response has been accepted as having been unintentionally delayed.

This matter is being referred to Technology Center 2100 for processing of the Request for Continued Examination under 37 CFR 1.114 filed with the instant petition.

Telephone inquiries should be directed to the undersigned at (571) 272-3206.


Liana Walsh
Petitions Examiner
Office of Petitions